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No. 00-1250

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

US AIRWAYS, INC.,

Petitioner,

v.

ROBERT BARNETT,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
SUMMARY OF ARGUMENT	4
ARGUMENT	6
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

	Page
Aka v. Washington Hospital Center, 156 F.3d 1284 (D.C. Cir. 1998)	7
Alan Wood Steel Co., 4 Lab. Arb. (BNA) 52 (1946) (Brandshain, Arb.)	18
Boersig v. Union Electric Co., 219 F.3d 816 (8th Cir. 2000)	16
California Brewers Ass'n v. Bryant, 444 U.S. 598 (1980)	10
Cassidy v. Detroit Edison Co., 138 F.3d 629 (6th Cir. 1998)	8, 21
Davis v. Florida Power & Light Co., 205 F.3d 1301 (11th Cir. 2000)	17, 21
EEOC v. Sara-Lee Corp., 237 F.3d 349 (4th Cir. 2001)	22
Eckles v. Consolidated Rail Corp., 94 F.3d 1041 (7th Cir. 1996), *cert. denied*, 520 U.S. 1146 (1997)	*passim*
Feliciano v. Rhode Island, 160 F.3d 780 (1st Cir. 1998)	21
Foreman v. Babcock & Wilcox Co., 117 F.3d 800 (5th Cir. 1997)	21
Franks v. Bowman Transportation Co., 424 U.S. 747 (1976)	10
Gile v. United Airlines, Inc., 95 F.3d 492 (7th Cir. 1996)	8
Humphrey v. Moore, 375 U.S. 335 (1964)	10
Kralik v. Durbin, 130 F.3d 76 (3d Cir. 1997)	21
Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989)	11, 16
Machinists v. Central Airlines, 372 U.S. 682 (1963)	17
Overly Mfg. Co., 68 Lab. Arb. (BNA) 1343 (1977) (Jones, Arb.)	18
Smith v. Evening News, 371 U.S. 195 (1962)	17

TABLE OF AUTHORITIES—Continued

	Page
Smith v. Midland Brake, Inc., 180 F.3d 1154 (10th Cir. 1999)	*passim*
Textile Workers v. Lincoln Mills, 353 U.S. 448 (1957)	17
Trans World Airlines v. Hardison, 432 U.S. 63 (1977)	16
Vaca v. Sipes, 386 U.S. 171 (1967)	17
Willis v. Pacific Maritime Ass'n, 244 F.3d 675 (9th Cir. 2001)	10, 17, 21, 23

STATUTES

29 U.S.C. § 158(d)	17
42 U.S.C. § 12101 *et seq.*	1
42 U.S.C. § 12111(2)	1
42 U.S.C. § 12111(9)(B)	1, 8, 13
42 U.S.C. § 12112(a)	1
42 U.S.C. § 12112(b)(2)	13, 14
42 U.S.C. § 12112(b)(5)(A)	1
45 U.S.C. §§ 151-188	2, 16
45 U.S.C. § 152, Seventh	17

LEGISLATIVE HISTORY

H.R. Rep. No. 101-485 (II), 101st Cong., 1st Sess. (1989)	8, 12, 13, 14
S. Rep. No. 101-116, 101st Cong., 1st Sess. (1989)	8, 12, 14

MISCELLANEOUS

F. Elkouri & E. Elkouri, *How Arbitration Works* (5th ed. 1997)	11, 17, 18, 21
R. Freeman & J. Medoff, *What Do Unions Do?* (1984)	18

TABLE OF AUTHORITIES—Continued

Page

Stephen P. Pepe & Scott H. Dunham, *Avoiding and Defending Wrongful Discharge Claims* (2000) 18

S. Slichter, J. Healy & E. Livernash, *The Impact of Collective Bargaining on Management* (1960)..... 11

BRIEF OF THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), a federation of 66 national and international labor organizations with a total membership of approximately 13 million working men and women, files this brief *amicus curiae* in support of respondent with the consent of the parties as provided for in the Rules of this Court.[1]

STATEMENT OF THE CASE

The Americans with Disabilities Act (ADA), 42 U.S.C. § 12101, *et seq.*, prohibits discrimination by a "covered entity," such as an employer, *id.* § 12111(2), against "a qualified individual with a disability because of the disability . . . in regard to . . . terms, conditions, and privileges of employment," *id.* § 12112(a). The ADA defines discrimination to include "not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified . . . employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity." *Id.* § 12112(b)(5)(A). The statutory definition of the term "reasonable accommodation" sets out various examples of such an accommodation, one of which is "reassignment to a vacant position." *Id.* § 12111(9)(B).

This case involves a claim of discrimination based on the employer's refusal to provide the plaintiff a reassignment accommodation. Pet. App. 2a-3a.

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[1] No counsel for a party authored this brief *amicus curiae* in whole or in part, and no person or entity, other than the *amicus curiae*, made monetary contribution to the preparation or submission of this brief.

In 1992-93, when the events in this case transpired, the plaintiff, Robert Barnett, was employed in the USAir (now US Airways) mailroom at the San Francisco International Airport. Pet. App. 2a. At that time, Barnett's terms of employment were governed by the Company's unilateral employment policies and were not embodied in any contract of employment.[2] The USAir employment policies included a "seniority policy" that provided for competitive employee bidding for positions based on the employee's length of service in a particular job classification. *Id.* at 50a.

In August 1992, USAir opened all of its San Francisco Airport cargo and mailroom positions to bidding. Pet. App. 50a. Barnett, who had a back injury that prevented him from doing cargo position work, requested that USAir make an exception to its seniority policy to allow him to maintain his mailroom position, even if more senior employees bid for the position. *Id.* U.S. Air refused that request and placed Barnett in an extra short-term "limited duty" mailroom position. *Id.* at 50a-51a. Five months later, US Air terminated that extra position, gave Barnett paid on-the-job leave for one month, and thereafter terminated his employment.[3]

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[2] The International Association of Machinists & Aerospace Workers, AFL-CIO, subsequently became the collective bargaining representative under the Railway Labor Act (RLA), 45 U.S.C. § 151 *et seq.*, of the craft and class including Barnett's former job. The working conditions at issue in this case, including assignment to vacancies, are now governed by the terms of a collective bargaining agreement between the Machinists Union and US Airways under the RLA.

[3] More fully stated, the sequence of events following Barnett's assignment to a "limited duty" position was as follows: In January 1993, Barnett's supervisors informed him that he would lose his limited duty mailroom position, because his five month stay in that position had exceeded the sixty day term for such a position provided for by Company policy. *Id.* at 51a. Barnett, who had sufficient seniority to bid for and obtain a cargo position, requested various changes in the cargo position that would allow him to perform that job, but USAir declined to make those changes. *Id.* USAir also

Barnett filed charges with the Equal Employment Opportunity Commission alleging a number of ADA violations. Pet. App. 3a. The EEOC found that there was reason to believe that USAir had discriminated against Barnett by denying him a reasonable accommodation. *Id.* Barnett thereafter filed suit raising both failure to accommodate and retaliation claims under the ADA. *Id.* The district court granted summary judgment in favor of USAir on all of Barnett's claims.

In the court of appeals, the focus of inquiry centered on Barnett's claim that "it would have been a reasonable accommodation for USAir to allow him to remain in the mail room, by making an exception to its seniority policy." Pet. App. 21a. In response to this claim, USAir argued that "the ADA guarantees Barnett no more than the opportunity to apply for and compete for reassignment," and that he was accorded this opportunity by the neutral application of the Company's seniority policy. *Id.* at 22a. A panel of the Ninth Circuit accepted this argument and sustained the district court's grant of summary judgment.

On rehearing *en banc*, the Ninth Circuit held that "an employer's unilaterally imposed seniority system [does not] trump[] a disabled employee's right to reassignment" under the ADA. Pet. App. 22a. In so ruling, the court of appeals acknowledged that "most circuits including our own have . . . held that the ADA does not require an accommodation which *conflicts with a collective bargaining agreement*." *Id.* at 25a n. 9 (emphasis added). The court distinguished these cases on the grounds that "where there is no collective bargaining agreement, no bargained for rights are involved," and that a unilaterally

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declined to reassign Barnett to one of the regular mailroom positions, which were at that point being filled by senior employees, on the ground that this would violate the Company's seniority policy. *Id.* Because Barnett could not perform any of the available cargo jobs, he was given paid on-the-job leave for one month and subsequently terminated from employment. *Id.* at 90a.

adopted "seniority system without more should not bar reassignment." *Id.* at 25a-26a.

US Airways (the successor to USAir) petitioned this Court to address whether reassignment of an employee with a disability to a position claimed by a more senior employee under the employer's unilaterally adopted seniority policy is a "reasonable accommodation" within the meaning of the ADA.

SUMMARY OF ARGUMENT

The Americans with Disabilities Act (ADA) prohibits employment discrimination against a qualified employee on the basis of disability. The Act defines discrimination to include not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified employee, unless the accommodation would impose an undue hardship on the operation of the employer's business. Among the "reasonable accommodations" identified in the statute is "reassignment to a vacant position."

By specifying that reassignment is a "reasonable accommodation" only where there is a "vacant position," Congress intended to make clear that an employer is not required to displace—or "bump"—another employee in order to accommodate an employee with a disability. Accordingly, there is no question that reassignment to a position that would result in displacing the incumbent job-holder is not a "reasonable accommodation" required by the Act.

In the instant case, US Airways argues that reassignment of an employee with a disability to a position to which a senior employee has a "legitimate expectation" under an employer-implemented "seniority policy" is not a "reasonable accommodation." US Airways bases that argument on a unanimous line of court of appeals decisions holding that a position is not vacant, even though not presently filled by an incumbent, where a collective bargaining agreement seniority system gives a senior employee a "*vested priority right*" to assume the position.

The theory of these cases is that, under a collective bargaining agreement seniority system, positions that are assigned on the basis of seniority are not "vacant" in the sense of being unfilled, because senior employees *have a contractual right* to the positions. Under such a system, an employer that does not assign a position to the senior employee has "bumped" that employee, not only from the position at issue but also from the employee's rightful place in the seniority "hierarchy." It follows that reassigning an employee with a disability to a position so as to bypass the senior employee with a contractual right to the position is not a reassignment to a vacant position.

US Airways' attempt to equate employer-implemented seniority policies with collective bargaining agreement seniority systems fails. Employer-implemented seniority policies do not create vested rights in the covered employees; rather, those policies leave the employer free to make assignments as the employer sees fit. Thus, a position covered by an employer-implemented seniority policy that is not presently filled by an existing employee is "vacant" and available for a "reasonable accommodation" reassignment, regardless of whatever "legitimate expectations" senior employees have with respect to the position.

Contrary to US Airways, drawing this distinction between contractual seniority systems and unilaterally adopted seniority policies is not to say that the parties to a collective bargaining agreement are free to contract their way out of their obligations under the ADA. Since the ADA requires reassignment only to a vacant position and does not require bumping, a collective bargaining agreement that precludes reassignment to positions that other employees have a seniority right to fill—with the result that such positions are not vacant—does not subject employees with disabilities to discrimination prohibited by the statute.

US Airways' contention that contractual seniority systems—like unilateral seniority policies—do not create contractual

rights in the covered employees is equally meritless. To the contrary, collective bargaining agreement seniority systems create rights in the covered employees that are protected by the federal labor laws. These seniority rights are judicially enforceable by the employees as a matter of federal law, and employers are forbidden from unilaterally modifying such rights until certain statutory conditions are fulfilled. In contrast, an employer-initiated "seniority policy" is merely a non-binding guideline for the exercise of management discretion.

US Airways contends that employer-implemented policies may be stated in contractual terms and give rise to contract rights. But US Airways' seniority policy is most certainly not stated in contractual terms. That policy was set out in a personnel policy guide that explicitly disclaimed any contractual import and stated that its contents were intended only as "guidelines for the exercise of management discretion." Indeed, US Airways deviated from its own policy in this case, as it had every management right to do.

ARGUMENT

This case concerns the interplay between the Americans with Disabilities Act's "reasonable accommodation" provision for "reassignment to a vacant position" and an employer-implemented "seniority policy." Pet. Br. 4. Insofar as US Airways treats directly with that interplay the Company argues that, "[e]ven if disabled employees are entitled to preferential treatment in reassignment as a general matter, that rule could not apply in the particular context of a seniority policy." *Id.* at 8.[4]

[4] On the question of whether, as a general matter, the ADA's "reasonable accommodation" provision requires an employer to give preference to an employee with a disability in making reassignments, US Airways argues that "awarding respondent an exception from the seniority policy would amount to granting him preferential treatment rather than enabling him to compete on an equal basis" and that "[a]n interpretation requiring employers to give preference to disabled employees in reassignment decisions would go well beyond the basic non-discrimination objectives of the ADA." Pet. Br. 7 & 8. Respondent's brief demonstrates the lack of merit in this argument—which has been firmly and properly rejected by "numerous courts [that] have assumed that the reassignment obligation means something more than treating a disabled employee like any other job applicant," *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1170 (10th Cir. 1999), quoting *Aka v. Washington Hospital Center*, 156 F.3d 1284, 1304 (D.C. Cir. 1998)—and we do not treat separately with the argument here.

US Airways' argument in this regard rests on the proposition that employer-implemented seniority policies "engender legitimate and settled expectations in employees" and the ADA does "not require[] employers to interfere with those expectations." Pet. Br. 9. The Company builds this argument on two predicates: (i) the uniform line of court of appeals cases holding that the ADA does not require a reassignment that conflicts with the seniority provisions of a collective bargaining agreement, *see* Pet. App. 25a n. 9; and (ii) an assertion that "[t]here is no material distinction under the statute" between the employee seniority *rights* created by collective bargaining agreement seniority provisions and the employee seniority *expectations* created by employer-implemented seniority policies. Pet. Br. 38. *See id.* at 38-41.

US Airways' argument is based on a plain misunderstanding of the scope and nature of the ADA's reasonable accommodation provision and of the legal basis on which the courts of appeals have held that reassignment in conflict with the seniority provisions of a collective bargaining agreement is *not* an ADA-required "reasonable accommodation"—a basis that does not apply to employer-implemented seniority policies. Those court of appeals decisions rest on Congress' determination that a "reasonable accommodation" reassignment is required *only* if the reassignment is to a "*vacant* position." None of those decisions rests on, or justifies, balancing, in an open-ended fashion, the interests of an employee with a disability against the interests of other employees with seniority "expectations."

In point I, *infra*, we analyze the court of appeals decisions considering whether reassignment is a "reasonable accommodation" in the context of a collective bargaining agreement seniority system. We then, in point II, *infra*, apply the lessons of those decisions to cases, like this one, considering whether reassignment is a "reasonable accommodation" in the context of an employer-implemented "seniority policy."

I. A. In drafting the ADA's reasonable accommodation provision, "Congress . . . significantly cabined the obligation to offer reassignment." *Smith v. Midland Brake*, 180 F.3d at 1170. Congress did so by "mak[ing] clear that the reassignment need only be to a vacant position—'bumping' another employee out of a position to create a vacancy is not required." S. Rep. No. 101-116, p. 31 (1989) (S. Rep.); H.R. Rep. No. 101-485 (II), p. 63 (1989) (H.R. Rep). *See* 42 U.S.C. § 12111(9)(B) ("reassignment to a vacant position" is a "reasonable accommodation").

It follows, as the courts of appeals have uniformly concluded, that "under the terms of the statute, if a position is not vacant it is not reasonable to require an employer to bump another employee in order to reassign a disabled employee to that position." *Smith v. Midland Brake,* 180 F. 3d at 1175.[5] And, a position is "not vacant," in the sense contemplated by the ADA, if "reassign[ing] a disabled employee to th[e] position" would

[5] *Accord Cassidy v. Detroit Edison* Co., 138 F.3d 629, 634 (6th Cir. 1998) ("a reassignment will not require creating a new job, moving another employee, promoting the disabled employee, or violating another employee's rights under a collective bargaining agreement"); *Gile v. United Airlines, Inc.*, 95 F.3d 492, 499 (7th Cir. 1996) ("An employer may be obligated to reassign a disabled employee, but only to vacant positions; an employer is not required to 'bump' other employees to create a vacancy so as to be able to reassign the disabled employee."); *Eckles v. Consolidated Rail Corp.*, 94 F.3d 1041, 1047 (7th Cir. 1996) (emphasis in original), *cert. denied*, 520 U.S. 1146 (1997) ("the suggestion that reassignment be to a *vacant* position suggests that Congress did not intend that other employees lose their positions in order to accommodate a disabled coworker").

"require [the] employer to bump another employee." *Smith v. Midland Brake,* 180 F. 3d at 1175. In common labor relations parlance, when we say that a position is *not* vacant because it belongs to employee A or that a job assignment to employee B would "bump" employee A, what we mean is that employee A has an established claim of right to the position.

For example, a position is certainly "not vacant"—and not open for a "reasonable accommodation reassignment"—if an employee has been permanently assigned to, and is holding, the position; and, that is true even when the incumbent employee is on vacation and physically away from the job. In employment relationship terms, the incumbent employee's claim of right to the position by reason of the permanent assignment is such as to render it filled and thus "not vacant."

Conversely, a position that has been *temporarily* assigned—either by temporarily reassigning an employee to perform the job or by contracting with a temporary employment agency to supply one of the agency's workers to do the job—is, in employment relations terms, not filled and, therefore, is "vacant" (and is open for a "reasonable accommodation reassignment" to an employee with a disability). That is so, because the incumbent employee, by reason of the terms of his temporary assignment, has no claim of right to the job.

Of most direct relevance to this case, in employment relations terms a position that an employer is contractually bound to assign to another employee is "not vacant" (and not open for reasonable accommodation reassignment). For example, if an employer enters into a contract with a job applicant to hire the applicant into a position on a particular date, that position is "not vacant," and is not open for a reasonable accommodation reassignment, even though the applicant will not begin to occupy the position until the specified starting date. The contract provides the job applicant a claim of right to the position equal to a claim of right by an incumbent permanent employee.

B. Against this employment relations background, every court of appeals to consider the question has concluded that "an existing position would not truly be vacant, even though it is not presently filled by an existing employee, if under a collective bargaining agreement other employees have a *vested priority right* to such vacant positions." *Smith v. Midland Brake,* 180 F. 3d at 1175 (emphasis added). *See Willis v. Pacific Maritime Ass'n*, 244 F.3d 675, 681 (9th Cir. 2001) ("[T]he positions they requested were not 'vacant,'" because "[t]he CBA provided that those jobs should be assigned based on seniority."). *See also id.* at 680 (citing decisions so holding from the First, Third, Fifth, Sixth, Seventh, Eighth, Tenth & Eleventh Circuits). In other words, "under a [collectively bargained] seniority system like that in place at [most unionized workplaces], few positions are ever truly 'vacant,' in the sense of being unfilled," because "positions held by less senior employees are open to be bid upon and acquired by more senior employees." *Eckles v. Consolidated Rail Corp.*, 94 F.3d at 1047.

These decisions have a sound footing in the law of labor contracts. "[O]ne of [a collective bargaining agreement seniority system's] major functions is to determine who gets or who keeps an available job." *Humphrey v. Moore*, 375 U.S. 335, 346-347 (1964). Under a typical collective bargaining agreement seniority system, "job assignments . . . are posted for competitive bidding and seniority is used to determine the highest bidder." *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 767 (1976). Thus, "[a] 'seniority system' is a scheme that, alone or in tandem with non-'seniority' criteria, allots to employees ever improving employment rights and benefits as their relative lengths of pertinent employment increase." *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 605-606 (1980) (footnotes omitted).

Given the nature of collective bargaining agreement seniority systems, an employer assignment of a position not presently filled by an incumbent employee to someone other than the

senior employee "bumps" the senior employee both from the particular position at issue and from the employee's rightful place in the seniority "hierarchy." *Lorance v. AT&T Technologies, Inc.*, 490 U.S. 900, 905 (1989). In the "competitive" sense relevant to deciding who fills a particular job, "seniority is a relationship between employees in the same seniority unit." F. Elkouri & E. Elkouri, *How Arbitration Works* 807 (5th ed. 1997). Employees within a particular employment unit—typically company-wide, plant-wide or department-wide—are ranked according to total time served on a specified basis—for example, employment time within a particular department or job classification. *See* S. Slichter, J. Healy & E. Livernash, *The Impact of Collective Bargaining on Management* 116-117 (1960). Given the hierarchical nature of a competitive seniority system, "for every person who[] . . . is advanced [within the system], someone will be adversely affected by such advancement." Elkouri & Elkouri, *How Arbitration Works* 807.

In this regard, the critical point for current purposes is that, in the collective bargaining agreement context, "[s]eniority is a contractual right . . . ." *Lorance v. AT&T Technologies,* 490 U.S. at 905. Thus, the most senior employee's claim to a particular position is—in every legally relevant sense—of at least the same strength as the claim of a less senior incumbent to continue holding the position. This is most vividly demonstrated by the common seniority rule that where a senior employee's position is eliminated, the senior employee has a paramount claim to a position held by a junior incumbent such as to enable the senior employee to take over the position notwithstanding the junior employee's incumbency. *See* Elkouri & Elkouri, *How Arbitration Works* 772-773 (senior employees are commonly provided this right in layoff situations). *See generally* Slichter, Healy & Livernash, *The Impact of Collective Bargaining on Management* 158-161.

As the courts of appeals have recognized, where a collective bargaining agreement seniority system is in place, reading "the

ADA [to] require[] as 'reasonable accommodation' that a disabled individual be given special job placement and job protection (from bumping) in violation of a bona fide seniority system in place under a collectively bargained agreement . . . poses a conflict not so much between the rights of the disabled individual and his employer and union, but between the rights of the disabled individual and those of his co-workers." *Eckles v. Consolidated Rail Corp.*, 94 F.3d at 1045-46 (footnotes omitted). And, such a reading of the statute would be contrary to Congress' clear statement that "'bumping' another employee . . . is not required" by the reasonable accommodation provision. S. Rep. at 31; H.R. Rep. at 63.

That "the text of the ADA" specifies—by providing for "reassignment to a *vacant* position"—that an employer is not required to bump another employee in order to accommodate an employee with a disability is explained by "the background of the ADA's 'reasonable accommodation' concept and the legislative history of the ADA." *Eckles v. Consolidated Rail Corp.*, 94 F.3d at 1047. "[T]he term 'reasonable accommodation' in the ADA was apparently borrowed from the regulations issued by the Equal Employment Opportunity Commission ('EEOC') in implementation of the Rehabilitation Act of 1973." *Id.*, citing S. Rep. at 31 & H.R. Rep. at 62. And, "courts have been unanimous in rejecting the claim that 'reasonable accommodation' under the Rehabilitation Act requires reassignment of a disabled employee in violation of a bona fide seniority system." *Eckles*, 94 F.3d at 1047. This background is particularly significant here, because it shows that "Congress drafted the ADA against the backdrop of well-established precedent that 'reasonable accommodation' under the Rehabilitation Act had never been held to require trumping the seniority rights of other employees." *Id.* at 1048.

In short, where a senior employee has a legal claim of right under the terms of a collective bargaining agreement to a position not presently occupied by an incumbent, the position is

"not vacant." "Consequently," in such circumstances, reassignment of an employee with a disability in a manner that bypasses the senior employee who has a contractual right to fill the position "does not constitute 'reassignment to a vacant position,' but goes further" by displacing an employee whose claim to the position is at least as strong as that of an incumbent. *Eckles v. Consolidated Rail Corp.*, 94 F.3d at 1047.

C. It bears emphasis at this point that—contrary to US Airways' suggestion—the cases addressing the ADA's reasonable accommodation reassignment requirement in the collective bargaining agreement seniority system context are consistent with the proposition that "parties, including parties to a collective bargaining agreement, are not free to contract their way out of the ADA's prohibitions." Pet. Br. 39. As the *Eckles* court observed, "if the ADA does not require that collectively bargained seniority rights be compromised in order to reasonably accommodate a disabled individual," it cannot be the case that the parties to an agreement creating such rights "are guilty of participating in a contractual arrangement that has the effect of subjecting [a worker with a disability] to prohibited discrimination." 94 F.3d at 1046.

It is true, as US Airways notes, Pet. Br. 39, that the ADA's definition of "discrimination" includes "participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified individual with a disability to the discrimination prohibited by [the ADA]." 42 U.S.C. § 12112(b)(2). But "[t]he basic intent of this provision is that an entity may not do through a contractual provision what it may not do directly." H.R. Rep. at 59-60. Since the ADA only requires "reassignment to a vacant position," 42 U.S.C. § 12111(9)(B), a collective bargaining agreement that precludes reassignment to positions that others have a seniority right to fill—with the result that such positions are *not* vacant—cannot be deemed to "have the effect of subjecting a covered entity's qualified individual with a

disability to the discrimination prohibited by [the ADA]," *id.* § 12112(b)(2). While a worker with a disability has the right to be reassigned to a vacant position—provided that the accommodation is otherwise reasonable and not an undue hardship—the Act does not require that employers or unions depart from traditional practices in order to *create* vacancies.

US Airways also notes that the House and Senate reports on the ADA state that "[a]n employer cannot use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this legislation." Pet. Br. 39, quoting S. Rep. at 32 & H.R. Rep. at 63. But this sentence appears in a paragraph that begins by explaining that the treatment accorded collective bargaining agreements under § 504 of the Rehabilitation Act "also applies to the ADA." H.R. Rep. at 63. And, as *Eckles v. Consolidated Rail Corp.* notes, "Congress drafted the ADA against the backdrop of well-established precedent that 'reasonable accommodation' under the Rehabilitation Act had never been held to require trumping the seniority rights of other employees." 94 F.3d at 1048. Moreover, immediately after the sentence of the committee reports invoked by US Airways, the reports provide the following example of what it would mean for "an employer [to] use a collective bargaining agreement to accomplish what it otherwise would be prohibited from doing under this Act":

> For example, a collective bargaining agreement that contained physical criteria which caused a disparate impact on individuals with disabilities and were not job-related and consistent with business necessity could be challenged under this Act. [H.R. Rep. at 63; S. Rep. at 32.]

It is obvious, then, that what Congress meant to preclude was an employer defending discriminatory job qualifications on the ground that they are embodied in a collective bargaining agreement.

II. US Airways insists that the logic of the cases considering reassignment as an ADA "reasonable accommodation" in the context of collective bargaining agreement seniority systems governs reassignment in the context of employer-implemented "seniority policies." Pet. Br. 37-39. In essence, US Airways' argument is that collective bargaining agreement seniority systems and employer-implemented seniority polices are identical in the following way: "an existing position would not truly be vacant, even though it is not presently filled by an existing employee, if under a collective bargaining agreement [seniority system or an employer-implemented seniority policy] other employees have a vested priority right [or a legitimate expectation] to such vacant positions." *Smith v. Midland Brake*, 180 F.3d at 1175.

On the salient point of whether a position is "truly vacant," no such identity can be drawn between collective bargaining agreement seniority systems and employer-implemented seniority policies. *Smith v. Midland Brake* and like cases "address only collectively bargained seniority systems that establish *rights* in other employees." *Eckles v. Consolidated Rail Corp.*, 94 F.3d at 1046 n. 9 (emphasis added).

The court of appeals cases recognize that limit because only the senior employee's vested priority contract right to an unoccupied position accords the employee a claim of right to the position at least as strong as the claim that an incumbent has to the position she is presently occupying. And, it is that claim of right that supports the conclusion that the position is filled—not vacant—and that assigning the position to another employee requires the employer to bump the first employee from the position.

In contrast, employer-implemented seniority policies that only provide guidelines for the exercise of management discretion do not provide the senior employee any claim of right to a position not presently filled. Rather, the very point of such a policy is to state the employer's preferred assignment approach while

maintaining the employer's prerogative to deviate, as the employer sees fit, from that approach in ways that disadvantage the senior employee and disappoint his seniority expectations. Under such a policy, the senior employee has *no* right to fill a position not presently held by an incumbent and the employer has every right to pass over the senior employee in disregard of the policy. Thus, where an employer-implemented seniority *policy* is in effect—as where any management discretion assignment policy is in effect—a position not permanently assigned to, and being filled by, an existing employee is a "vacant position" and one open to reasonable accommodation reassignments.

To be sure, US Airways would deny any relevant distinction between collective bargaining agreement seniority systems and employer-implemented seniority policies on the theory that "where a seniority system is part of a collective bargaining agreement, the employees themselves do not possess contract rights," Pet. Br. 40 n. 15, and that contractual seniority systems like seniority policies do not create "vested priority rights" in employees but only "seniority expectations." This reflects a fundamental misunderstanding of the nature of a collective bargaining agreement.

There is no question that "[s]eniority is a contractual right," *Lorance v. AT&T Technologies*, 490 U.S. at 905, or that, where a "senior employee" has been denied a position to which he is entitled under a collective bargaining agreement seniority system, the employee "ha[s] been deprived of his contractual rights under the collective-bargaining agreement." *Trans World Airlines v. Hardison*, 432 U.S. 63, 80 (1977).

"Seniority systems contained in CBAs . . . create rights in union members which are protected by the National Labor Relations Act (NLRA), 29 U.S.C. § 151-187," or, as in the case of railroads and airlines, by the Railway Labor Act, 45 U.S.C. §§ 151-188. *Boersig v. Union Electric Co.*, 219 F.3d 816, 822

(8th Cir. 2000).[6] In two mutually reinforcing senses, "collectively bargained seniority rights have a pre-existing special status in the law." *Eckles v. Consolidated Rail Corp.*, 94 F.3d at 1052.

In the first place, contractual seniority rights are judicially enforceable as a matter of federal statutory law. *See Textile Workers v. Lincoln Mills*, 353 U.S. 448, 454 (1957); *Machinists v. Central Airlines*, 372 U.S. 682, 694-695 (1963). In this regard, US Airways could not be more wrong when it suggests that only "the union . . . is entitled to enforce the contract." Pet. Br. 40 n. 15. For it is clear that the employees, too, are entitled to enforce their rights under the collective bargaining agreement. *See Smith v. Evening News*, 371 U.S. 195, 200 (1962); *Vaca v. Sipes*, 386 U.S. 171, 185-186 (1967).

In addition, collectively bargained seniority rights are made more durable by the provisions in both the NLRA and the RLA specifically forbidding an employer from modifying such rights until the agreement containing them has run its term and until the employer has satisfied its statutory duty to bargain over the modification. 29 U.S.C. § 158(d); 45 U.S.C. § 152, Seventh. The fact that seniority rights may be modified by mutual agreement between the employer and the union does not mean that the rights provided by a collective bargaining agreement are any less the employees' rights. *See* Pet. Br. 40 n. 15. The union negotiates the agreement—and any changes to it—as the agent of the employees. And, many of the provided rights—seniority in particular—are, by their nature, personal to the employees.

In sum, "seniority benefits exist as 'rights' only to the extent made so by contract." Elkouri & Elkouri, *How Arbitration*

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[6] *Accord Willis v. Pacific Maritime Ass'n*, 244 F.3d at 680-681 (where an ADA case "involves a bargained for seniority system contained in a CBA . . . the rights of other union members under the National Labor Relations Act . . . are implicated"); *Davis v. Florida Power & Light Co.*, 205 F.3d 1301, 1307 (11th Cir. 2000)("[w]e agree with the Seventh Circuit that 'collectively bargained seniority rights have a pre-existing special status in the law'").

Works 809. And, "practically all the collective agreements that unions have negotiated . . . contain[] seniority provisions . . . that significantly circumscribe th[e] freedom of employers," *Overly Mfg. Co.*, 68 Lab. Arb. (BNA) 1343, 1345 (1977) (Jones, Arb.), by vesting employees with contractual seniority rights.

In contrast, "[b]efore the existence of a contract, . . . the employer has all rights in connection with promotions and transfers and need pay no heed to seniority of the workers . . . ." Elkouri & Elkouri, *How Arbitration Works* 809, quoting *Alan Wood Steel Co.*, 4 Lab. Arb. (BNA) 52, 54 (1946) (Brandshain, Arb.). "In the nonunion sector, management often takes account of seniority but can ignore it when it chooses." R. Freeman & J. Medoff, *What Do Unions Do?* 123 (1984). In that setting, where seniority rights are not established by contract, a seniority policy is a non-binding statement of normal management procedure, which management is free to follow or ignore.

US Airways counters that "employment policies are often determined to give rise to contract rights even when not the product of collective bargaining." Pet. Br. 40. But the very treatise cited by US Airways to demonstrate this possibility—Stephen P. Pepe & Scott H. Dunham, *Avoiding and Defending Wrongful Discharge Claims* (2000)—advises that

> disclaimers in employee handbooks and personnel manuals or statements that the employer reserves the right to make unilateral changes or modifications can negate the contention that such employee handbooks or personnel manuals create a binding employment contract. To be effective, disclaimers should be clear, conspicuous and unambiguous. [*Id.* § 2:24.]

And, USAir heeded this advice by prefacing the "Customer Service Agent Personnel Policy Guide" containing the Company seniority policy, JA 21, with a very clear disclaimer that "[t]he Agent Personnel Policy Guide is *not* intended to be a contract

(express or implied), or otherwise to create legally enforceable obligations for continued employment."[7]

[7] The introduction to USAir's Customer Service Agent Personnel Policy Guide reads, in its entirety, as follows:

> This Agent Personnel Policy Guide is intended to provide *guidelines for the exercise of management discretion* in personnel matters that pertain to the conditions under which you work. *It is intended to guide your Supervisor's decisions* regarding interpretation and implementation of policies and regulations that apply to your job classification.
>
> You are encouraged to read the Agent Personnel Policy Guide. To assist you in reviewing the Guide, your Supervisor is responsible to assure that:
>
> —the Agent Personnel Policy Guide is readily available for your review at all times. Your Supervisor will advise you of its conveniently accessible assigned location so that you never have to ask to see it.
>
> —your use of the Guide will not be hampered or questioned in any way.
>
> —policies and regulations are reviewed with all employees new to classifications covered by the Agent Personnel Policy Guide.
>
> The Agent Personnel Policy Guide is *not* intended to be a contract (express or implied), or otherwise to create legally enforceable obligations for continued employment on the part of either USAir or its employees. You are free to leave USAir at any time or for any reason, and USAir reserves a similar right. This means that you and USAir both have the right to terminate the employer-employee relationship at any time, with or without advance notice and with or without cause. This is called "employment at will" and nothing in this Agent Personnel Policy Guide is intended to alter this employer-employee relationship. No individual has the authority to alter this "employment at will" relationship, or otherwise modify or alter USAir policy. Any modification of USAir policy, or any contract for employment *must* be in writing, and signed by an officer of the Human Resources department.
>
> This Agent Personnel Policy Guide supersedes and replaces all previous personnel policies, practices and guidelines. However, USAir

The difference between contract-based rights and the expectations created by unilateral employer policies is well illustrated by USAir's initial response to Barnett's request for an accommodation.

Under USAir's seniority policy, vacant positions are filled by competitive bidding on the basis of "group classification seniority," i.e., on the basis of service in one of the defined groups of jobs. JA 25 & 28. However, it was also USAir's policy to create special "limited duty" positions for periods of no more than sixty working days that would not be filled by competitive bidding. Pet. App. 51a. When Barnett learned that he was about to be displaced from the mailroom by one of two senior employees bidding on the job, USAir put him into a "limited duty" position in the mailroom. And, USAir then ignored its own policy and allowed Barnett to stay in the "limited duty" position for five months. If USAir were contractually bound to follow the terms of its policy, keeping Barnett for more than two months would have violated the rights of senior employees seeking a job in the mailroom. As matters stood, however, USAir was free to leave Barnett in the mailroom for as long as the Company wished without any concern that a senior employee could assert that his or her seniority rights had been violated.

In just this highly relevant respect, seniority rights under a collective bargaining agreement seniority system are fundamentally different from seniority expectations under an employer-implemented seniority policy that is merely a guideline for the exercise of management discretion. "[T]he

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reserves the right to change any and all of the stated policies and procedures in this Guide at any time, without advance notice. For this reason, all employees are encouraged to check with their Supervisor regarding the status of any particular policy, procedure or practice. All employee questions and comments are welcomed. [Personnel Policy Guide for Customer Service Agents, (emphasis in first paragraph added; other emphasis in original).]

requirement of seniority recognition" in a collective bargaining agreement is "[o]ne of the most severe limitations upon the exercise of management discretion." Elkouri & Elkouri, *How Arbitration Works* 806. But consideration of seniority, as "an exercise of management discretion," (USAir Personnel Policy Guide, *supra*, n. 7), is no restriction on that discretion at all. And, concomitantly, such discretionary consideration of seniority provides covered employees with no enforceable rights and no prior claim to a position that they do not occupy.

It is for just this reason that the Ninth Circuit has recognized a distinction in ADA reasonable accommodation cases between "a seniority system [that is] unilaterally imposed by an employer," where "no bargained for rights are involved," and "a bargained for seniority system contained in a CBA." *Willis v. Pacific Maritime Ass'n*, 244 F.3d at 680. For the same reason, the court of appeals collective bargaining agreement seniority system cases have stressed that "only collectively-bargained seniority systems that establish rights in other employees," *Eckles v. Consolidated Rail Corp.*, 94 F.3d at 1046, make reassignment in violation of those rights "*per se* unreasonable," *Willis*, 244 F.3d at 680.[8]

III. The foregoing is not meant to suggest that an employer's unilateral seniority policy can never provide a defense to an ADA reasonable accommodation claim. Once it has been

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[8] *See Davis v. Florida Power & Light Co.*, 205 F.3d at 1306 ("ADA does not require accommodations . . . that contravene the seniority rights of other employees under a collective bargaining agreement"); *Feliciano v. Rhode Island*, 160 F.3d at 787 ("an employer is not required to violate the provisions of a collective bargaining agreement or the rights of other employees in seeking such reassignment"); *Cassidy v. Detroit Edison Co.*, 138 F.3d at 634 ("reassignment will not require . . . violating another employee's rights under a collective bargaining agreement"); *Kralik v. Durbin*, 130 F.3d 76, 82 (3d Cir. 1997) ("ADA does not require an employer to take action inconsistent with the contractual rights of other workers under a collective bargaining agreement"), quoting *Foreman v. Babcock & Wilcox Co.*, 117 F.3d 800, 810 (5th Cir. 1997).

determined that an expectation based on an employer seniority policy does not render an unoccupied position "filled," the questions remain whether reassignment to the vacant position is reasonable and whether such reassignment causes the employer undue hardship.

"Because reasonableness is [the] guide, there may be other important employment policies besides protecting rights guaranteed under a collective bargaining agreement that would make it unreasonable to require an employer to reassign a disabled employee to a particular job." *Smith v. Midland Brake,* 180 F.3d at 1175-76. For example, a "well-entrenched seniority system . . . not rooted in a collective bargaining agreement [may be] so well established that it gives rise to legitimate expectations by other, more senior employees to a job that the disabled employee might desire" with the result that "[r]equiring an employer to disrupt and violate any such well-established reasonable expectations of seniority rights in order to favor a disabled employee in a job reassignment could, at least under some circumstances, constitute a fundamental and unreasonable alteration in the nature of the employer's business." *Id. See, e.g., EEOC v. Sara-Lee Corp.*, 237 F.3d 349, 355 (4th Cir. 2001).

US Airways has not made the context-specific showing required to excuse an employer's refusal to reassign an employee with a disability to a vacant position. USAir had disclaimed any obligation to adhere to its seniority policy, had told employees that the policy is discretionary, and in fact had unilaterally changed the very policy it now invokes. *See* JA 50-51. What is more, USAir showed by its treatment of Barnett that the Company did not regard its seniority policy as precluding accommodation: it kept Barnett in a "limited duty" mailroom position for five months despite its announced policy allowing "limited duty" for only two months, without any apparent adverse consequences to the Company's operations. This demonstrates that implementing the discretionary policy by accommodating Barnett would have caused no undue disruption of US Airways' operations.

It is precisely because US Airways cannot show that accommodating Barnett would have been unreasonable in any other respect that it strains to invoke the cases holding that "an accommodation that is contrary to the seniority rights of other employees set forth in a CBA would be unreasonable per se." *Willis v. Pacific Maritime Ass'n*, 244 F.3d at 679. But, as we have seen, the cases applying this *per se* approach to collective bargaining agreement seniority systems rest on an interpretation of the reasonable accommodation reassignment provision's language limiting such required reassignments to "vacant positions." And, the "vacant position" analysis turns on the understanding that "an existing position would not truly be vacant, even though it is not presently filled by an existing employee, if under a collective bargaining agreement other employees have a vested priority right to such vacant positions." *Smith v. Midland Brake*, 180 F.3d at 1175. This analysis has no application to employer policies that do not create any "vested priority right[s]."

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted,

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